Petition

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81-559

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT L. BLUEMLE,

PETITIONER,

VS.

N. K. PARRISH, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

One question is presented by the opinion of the Court of Appeals: Whether the federal appellate court can depart from the well-established principle of Texas law which precludes a third party from electing recovery on appeal against the principal when the agent was found liable by the trial court.

LISTING OF PARTIES

Parties in the United States Court of Appeals were plaintiff N.K. Parrish, Inc., and defendants Southwest Beef Industries Corporation, Arizona National Cattle Company, Bankers Ag Credit Corporation, Russell Winter, R.E. Hogan, Lee R. Delay, Brian O.M. Quinn, James Dougherty, Robert Bluemle, E.W. McFarland, Bill Lacy, B.G. Cattle Co., Michael Jarvis and Ben Steele.

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PETITION OF ROBERT L. BLUEMLE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Robert L. Bluemle prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on March 13, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 638 F.2d 1366, is reproduced as Appendix A to this petition. The opinion and judgment of the District Court has not been reported and is reproduced as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 13, 1981. A timely petition for rehearing and rehearing en banc was

denied on June 22, 1981, and the notice of denial is reproduced as Appendix C to this petition. Petitioner filed this Petition for Writ of Certiorari within ninety days of the Order denying his petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 17(a).

STATEMENT OF THE CASE

This case arises from petitioner's participation in a "Managed Cattle Feeding Program" (hereinafter "the Program") sponsored by Arizona National Cattle Company (hereinafter "Arizona National"). The Program was designed by Arizona National for individuals who wished to purchase cattle as a business investment. As agent for such individuals, Arizona National would be responsible for all matters involved in raising the cattle, including the purchase

of the cattle, the securing of feedlots, the purchase of feed grain, and the eventual sale of the cattle. In addition to the investment opportunity, both Arizona National and potential investors recognized that investors would receive an additional benefit from participation in the program: a tax deduction for prepayment of grain purchases for all grain actually purchased in 1974 for use throughout the course of the Program.

Petitioner first discussed his possible participation in the Program with a representative of Arizona National in mid-December 1974, and purchased ten units in the Program shortly thereafter. Petitioner designated Arizona National to be his agent for all matters involved with the Program, with the express understanding that all grain purchases made on his behalf would be

completed in 1974 to secure the attendant tax benefits.

Unbeknownst to petitioner, Arizona National had already contracted to purchase substantial quantities of grain from N.K. Parrish, Inc. on terms that had become highly unfavorable to Arizona National by mid-December. Arizona National had not been able to accept delivery of the grain. At the time that petitioner entered the Program and executed the agency agreement, Arizona National was attempting to renegotiate the terms of the pre-existing grain contracts with Parrish.

The negotiations between Arizona National and Parrish were not completed until January 1975. At that time new contracts, dated January 23, 1975, were drawn up by Parrish to reflect the new agreement. However, Arizona National requested that the contracts be

backdated to December 31, 1974, to comply with its obligations to its investors. Parrish agreed to this request. Petitioner and the other investors knew nothing of the original or renegotiated grain contracts. Petitioner was told only that grain was purchased on his behalf on December 31, 1974.

As agent for the individual investors under the Program, Arizona National assigned a portion of the renegotiated contracts to petitioner and to each of the other investors. Arizona National subsequently breached the renegotiated contracts with Parrish. Parrish sued Arizona National and, when it learned of their identities, the individual investors.

The district court found that the investors were undisclosed principals who had conferred limited powers of

agency on Arizona National, and that the investors had entered into the cattle feeding program for its 1974 tax advantages.[1] Because the original grain contracts were made before the investors appointed Arizona National as their agent, and because the renewal contracts were finalized after the 1974 tax year, the court held that Arizona National had no authority to make the grain purchases from Parrish on the investors' behalf. Accordingly, the trial court entered judgment for Parrish against Arizona National, but ordered that Parrish was to take nothing from the investors.

Parrish appealed the portion of the judgment which provided that the investors were not liable for contract

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1 The basis for federal jurisdiction in the district court was diversity jurisdiction pursuant to 28 U.S.C. §1332.

damages. A divided panel of the Fifth Circuit Court of Appeals reversed in part, ruling that petitioner and the other investors were liable to Parrish on the grain contacts because the agent had authority to purchase the grain for the investors, and because the investors received and retained the benefits of the transaction made on their behalf. The majority of the court permitted Parrish to elect recovery on appeal against petitioner and the other investors, notwithstanding the fact that the investors had been found not liable by the trial court.

REASONS FOR GRANTING THE WRIT

The majority of the court below erred in permitting Parrish to elect on appeal to have judgment against the investors, rather than against their agent, Arizona National. The Court of Appeals refused to comply with the

well-established rule of Texas law which requires a third party to choose, before entry of judgment, whether to hold the principal or agent liable.

Parrish's appeal was limited to the portion of the trial court's judgment providing that plaintiff take nothing from the named investors. (App. at A-30.) There was no appeal from the judgment against the agent, Arizona National, and thus Parrish's right to recover all the damages from Arizona National remained intact at the time the appeal was instituted. (App. at A-12.) Therefore, Parrish had already elected to proceed against the agent, and was barred by Texas law from seeking an additional recovery from the principals.

In allowing election to be made on appeal, the Fifth Circuit disregarded a long line of Texas decisions which would have precluded Parrish from pursuing the

investors on appeal. The court below has so far departed from the established and accepted standards of Texas jurisprudence as to call for an exercise of this Court's supervisory powers.

Under Texas law, once judgment is recovered against an agent by one who knows the identity of the undisclosed principal, the principal is discharged from liability. Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 274 (5th Cir. 1980), citing Sherill v. Bruce Advertising, Inc., 538 S.W.2d 865 (Tex. Civ. App. 1976); National Marine Service, Inc. v. C. J. Thibodeaux and Co., 380 F.Supp. 1076, 1079 (S.D.Tex. 1973), aff'd, 501 F.2d 940 (5th Cir. 1974). The majority of the court below recognized the existence of this rule (App. at

13-14), yet failed to apply it in the case at bar.[2]

Sherill reveals that a judgment against an agent bars a subsequent recovery against the principal. The appellate court there ruled that the plaintiff could not elect to look to the undisclosed principal for payment after obtaining a final judgment against the agent:

> "An undisclosed principal is discharged from liability upon a contract if, with knowledge of the identity of the principal, the other party recovers judgment against the

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2 In allowing Parrish to elect recovery against the principals, the majority relied on Medical Personnel Pool of Dallas, Inc. v. Seale, 554 S.W. 2d 211 (Tex.Civ.App. 1977). However, as Judge Henderson notes in his opinion dissenting in part, Medical Personnel is short of analysis, ignores previous Texas decisions, and fails to cite any case permitting election on appeal (App. at A-38).

> agent who made the contract, for breach of the contract. While this rule has received some discredit, the Texas courts have consistently followed it. Here, the judgment against the agent Crane-Maier has become final. On the theory of principal and agent, the principal, Sherrill Trust, cannot now be held liable since there is a final judgment had against its agent for breach of the contract." (Id. at 867; emphasis added; citations omitted.)

As Judge Henderson points out in his opinion dissenting in part, a long line of Texas decisions require the plaintiff to elect between principal or agent before entry of judgment. (App. at A-31-33.) The court in Owen v. King,

84 S.W.2d 743, 750 (Tex.Civ.App. 1935) enunciated the well-established rule that a "seller may sue both the agent and the undisclosed principal, and at his option may, before judgment, elect to hold the undisclosed principal liable by taking a nonsuit as against the agent."

The identical principle was set forth in Veazie v. Beach Plumbing & Heating Co., 235 S.W. 695 (Tex. Civ. App. 1921):

> "Where a suit is brought against the agent of an undisclosed principal, and the agent discloses his principal, who is thereupon brought in as a party, and the plaintiff establishes a case both against the agent and the principal, he must elect which

> of the two he will ask judgment against." (Id. at 697-98; emphasis added.)

See also Pittsburgh Plate Glass Co. v. Roquemore, 88 S.W. 449, 450 (Tex. Civ. App. 1905) ("[P]laintiff could not recover judgment against both [agent and undisclosed principal] for the debt, but . . . would have to elect which of the two it would ask judgment against.")

Other reported opinions state that a third party cannot even name both the undisclosed principal and agent in a single suit, but must elect between them before suit is filed. Heffron v. Pollard, 73 Tex 96, 11 S.W. 165, 166 (1889) ("a plaintiff cannot sue both; he must make his election"); Diacomis v. Wright, 20 S.W.2d 139, 140 (Tex.Civ.App. 1929), rev'd in part on other grounds, 34 S.W.2d 806 (Tex. 1931) ("either but not both, may be sued for a breach");

Nail v. Boothe, 265 S.W. 1051 (Tex.Civ. App. 1924) ("the plaintiff cannot recover against both the agent and undisclosed principal, but must elect which he will sue").

The foregoing decisions demonstrate that petitioner was discharged from liability upon the renegotiated grain contract once Parrish obtained judgment against Arizona National in the trial court. In allowing Parrish to elect recovery against the petitioner, the Fifth Circuit erroneously departed from the well-settled Texas mandate which barred the plaintiff from pursuing the principal on appeal.

In disregarding the election of remedies doctrine consistently set forth by the state decisions, the Fifth Circuit has undermined the authority of the Texas courts. This Court's supervisory

powers are urgently needed in order to review the decision of the court below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

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APPENDIX A

N. K. PARRISH, INC.,
Plaintiff-Appellant,

v.

SOUTHWEST BEEF INDUSTRIES CORPORATION, Etc., et al.,
Defendants-Appellees.

No. 78-1041.

United States Court of Appeals,
Fifth Circuit.

March 13, 1981.

Robert E. Garner, Lubbock, Tex., for plaintiff-appellant.

George McLachlan, Lamar, Colo., for Southwest Beef Industries, Arizona Nat'l, Delay and Hogan.

J. Orville Smith, Lubbock, Tex., for Bankers Ag Credit Corp.

Charles B. Jones, Lubbock, Tex., for Dougherty, Quinn, Bluemle, McFarland, Lacy, B. G. Cattle, Jarvis and Steele.

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge CLARK.

Opinion concurring in part and dissenting in part filed by Circuit Judge HENDERSON.

CHARLES CLARK, Circuit Judge:

N. K. Parrish, Inc., sued to recover payments on contracts for the purchase of grain. The primary issue on appeal is whether a group of individual taxpayer-investors in a cattle feeding program sponsored by Arizona National Cattle Company is liable to Parrish for grain purchased from Parrish by Arizona National and assigned to the feeding program. We conclude that the investors are liable and that Parrish can elect on

appeal to have judgment against them rather than against their agent, Arizona National.

I. FACTS

In October and November of 1974, Arizona National and Southwest Beef Industries Corporation contracted with Parrish to purchase some eleven million pounds of feed grain. Southwest Beef acted as agent for Arizona National in executing five contracts. A small quantity of the grain was delivered and paid for under the contracts, but in December 1974 Arizona National no longer could fulfill its part of the agreements. It contacted Parrish and, sometime before December 31, 1974, the parties agreed upon renegotiated contract terms. In particular, the renegotiated contract was conditioned upon a $25,000 deposit from Arizona National to Parrish. The deposit was made in

January of 1975, and the document embodying the renegotiated contract was prepared by Parrish, and dated January 23, 1975.

In December 1974, while Arizona National was renegotiating its grain contract with Parrish, it entered into agency agreements with a group of individual investors. Under Arizona National's "Managed Cattle Feeding Program," individual investors paid Arizona National to acquire, raise, and sell cattle on their behalf. Each participant in the program executed an agency agreement under which Arizona National was entitled to exercise all functions required for the program, including the power to incur debts on the investors' behalf. The prospectus issued by Arizona National advised investors that they might be able to obtain substantial tax advantages under

this arrangement, including deductions for the cost of feed purchased in advance of need, but, as also pointed out by the prospectus, the profitability of the cattle feeding program itself was problematical. The agency agreement included an optional indemnification term, under which an investor could limit his personal liability, but no investor took advantage of this provision.

In late January 1975, Arizona National persuaded Parrish to back date the renegotiated grain purchase contract to December 31, 1974. In its capacity as agent for the individual investors under the cattle feeding program, Arizona National assigned to each investor a portion of the renegotiated grain purchase contract. Each investor deducted his portion of the Parrish feed

grain contract cost on his 1974 tax return. Ultimately, however, Arizona National was unable to accept delivery of, or pay for, the feed grain purchased from Parrish. Parrish sued to recover its damages under the breached contract from Arizona National and, when it learned of their identity, from the individual investors.

The case was tried without a jury, and the district court entered extensive findings. The court found that the investors were interested in the cattle feeding program primarily for its 1974 tax advantages, and that the investors were undisclosed principals who had conferred limited powers of agency on Arizona National. Because the original grain deal was struck before the investors appointed Arizona National as their agent, and because the renegotiated contract was finalized after the 1974

tax year had expired, the court ruled that Arizona National had no authority to make the grain purchases on the investors' behalf. The trial court also found that the investors' potential liability under the cattle feeding program was limited to the amount of their initial investment, approximately $6500 in most cases. Based on these findings, the trial court entered judgment for Parrish against Arizona National for the full amount of the contract damages, but ordered that Parrish was to take nothing from the investors.

II. PAROL EVIDENCE

The trial court found that "it was the understanding of all the parties in the cattle feeding program that the individual investors would have no liability in excess of the $6,500 per unit." The court concluded that, because of this limitation, the investors

could not be responsible for Parrish's contract damages. It is apparent, however, that the trial court's finding is based wholly on parol evidence. The agency agreement signed by each investor explicitly provides that "[i]t is agreed and understood that Arizona National in no way participates in, nor is liable for, any Net Loss upon the sale of the unit(s)." Moreover, the prospectus describing the cattle program to potential investors includes on its cover the following warning, printed in large type: "This offering involves a high degree of risk... [A]n owner, because of the high proportion of borrowings in a program, should be prepared to incur a substantial loss in excess of his cash investment." As if these provisions alone were not dispositive, the prospectus continued, with remarkable clairvoyance, to caution that

> [s]ince the legal relationship between each Owner and the Company is that of principal and agent... an owner is personally liable (to an unlimited extent) for all obligations incurred on his behalf by the Company within the scope of its authority under the Agreement. For instance, if the Company were to misapply an Owner's funds and fail to pay feed bills incurred for the Owner's cattle, the Owner may be personally liable to the feedlot operator for the payment of those bills.

Thus, the written agreements, as executed without the optional indemnification, are free from ambiguity. The investors were exposed to liability far in excess of their initial $6500 investment.

[1, 2] Texas law on the use of parol evidence is equally unambiguous. In Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30, 32 (1958), the Texas Supreme Court made clear that a written contract is presumed to embody the entire agreement between the parties. Previous or inconsistent agreements, whether oral or written, are inadmissible to vary the terms of the written contract. Id. Recent Texas cases reaffirm this rule. See, e.g., Lakeway Co. v. Leon Howard, Inc., 585 S.W.2d 660, 662 (Tex. 1979); Texas Export Development Corp. v. Schleder, 519 S.W. 2d 134, 137 (Tex.Civ. App. 1974, no writ). The investors urge that their limitation of liability "understandings" were collateral agreements, or agreements which induced the written contracts, and, under Texas law, are considered exceptions to the parol evidence

rule, e.g., Lakeway Co. v. Leon Howard, Inc., supra, 585 S.W.2d at 662; Anderson v. McRae, 495 S.W.2d 351, 360-61 (Tex. Civ.App. 1973, no writ). No such limitation of an investor's liability could be collateral. It would directly conflict with the unambiguous terms of both the agency agreement and the prospectus, and the trial judge erred in considering such evidence. We hold that the agreement and the prospectus are the complete and exclusive expression of the agency relationship between the investors and Arizona National, and that the investors were subject to liability in excess of the $6500 unit price.

III. ELECTION ON APPEAL

[3] Parrish asks us to find that the investors are liable for the contract damages. There has been no appeal from the judgment against Arizona National, however, and thus Parrish's

right to recover all the damages from Arizona National is, at least theoretically, intact.[1] The investors argue that Parrish has elected to proceed against the agent, and is precluded under Texas law from seeking an additional judgment against the principal.[2]

It is elementary that an aggrieved third party cannot recover full damages both from an undisclosed principal and from the agent. See Restatement (2d) of Agency § 210(1) (1957). This principle

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1 We are advised by counsel that Arizona National is bankrupt. As a practical result, Parrish's judgment in the trial court has doubtful value.

2 In this diversity case, of course, we are bound to apply the laws of the forum state. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188, 1194 (1938). While there is some suggestion that Arizona law should apply to the agency agreement, see note 3, infra, the issue of electing between principal and agent is outside the agreement itself, and thus is governed by the law of the forum.

is fully recognized in Texas law. See Moody-Seagraves Ranch, Inc. v. Brown, 69 S.W.2d 840, 844 (Tex.Civ.App. 1934, writ ref'd); Diacomis v. Wright, 20 S.W. 2d 139, 140 (Tex.Civ.App. 1929), aff'd in part, rev'd in part on other grounds, 34 S.W.2d 806 (1931). Recent Texas cases, however, evince a subtle approach to the question of when the plaintiff must choose between agent and principal. Sherrill v. Bruce Advertising, Inc., 538 S.W.2d 865, 867 (Tex.Civ.App. 1976, no writ), might be read to hold that any judgment against the agent bars proceedings against the principal. The Sherrill trial court found that both the agent and the principal were liable as joint venturers. Only the principal appealed. The appellate court ruled, not only that there was no joint venture liability, but also that the principal could not be liable under agency doctrine because a

judgment against the agent already had become final. According to the court, "[o]n the theory of principal and agent, the principal... cannot now be held liable since there is a final judgment had against its agent for breach of the contract." Id. at 867.

By contrast, in Medical Personnel Pool of Dallas, Inc. v. Seale, 554 S.W. 2d 211, 214 (Tex.Civ.App. 1977, writ ref'd n.r.e.), the court permitted a third party to elect between principal and agent on appeal, even though the third party had accepted judgment against the principal in the trial court. As the court explained in denying the motion for rehearing, "[a]n election by a party contemplates the freedom by that party to choose [the] defendant against whom it desires judgment." Id. at 215. Because the trial court had made the election for the

third party, by attributing full liability to the principal, and none to the agent, the court of civil appeals held that the third party was entitled to elect on appeal to take his judgment against the agent instead.

It is difficult to reconcile the Sherrill and Medical Personnel Pool opinions. In Sherrill, the third party was not permitted to pursue the principal on appeal when both principal and agent were found liable in the trial court. In Medical Personnel Pool, the third party was permitted to pursue the agent on appeal, even though the agent enjoyed an express ruling of nonliability by the trial court. Because Texas has no procedure for certification, it is our duty, in this diversity case, to choose which authority is to be applied to the facts here.

The case before us is virtually indistinguishable from Medical Personnel Pool. In that case, as in this one, an agent acting on behalf of an undisclosed principal contracted with the third party. In both cases the third party brought suit against both the agent and the undisclosed principal. In neither case did the trial court require that the plaintiff elect to sue one or the other. After trial, the court in each case erroneously ruled that one party was immune from liability. In Medical Personnel Pool, the court granted the agent's motion for a judgment non obstante veredicto. In our case, the district court ruled that the principals--the investors--were immune from liability. When confronted with this scenario on appeal, the Texas court in Medical Personnel Pool held that the

trial court's error prevented the plaintiff from making a voluntary election, and that the party was entitled to elect on appeal. By the same token, we believe that, under Texas law, Parrish is entitled to elect recovery against the principals in the present case.

While Sherrill also is similar in many respects to the case before us, the opinion in that case devotes only cursory attention to the election issue. In Sherrill, the undisclosed agency theory was advanced for the first time on appeal, and formed no part of the trial court's decision. By contrast, in this case and in Medical Personnel Pool the agency theory of liability was fully developed at trial. More important, the Sherrill court merely recited the rule prohibiting double recovery and applied it to the facts before it without analysis of the rationale for the rule. The

possibility of an election on appeal was not discussed. In Medical Personnel Pool, on the other hand, the court clearly stated that the election rule required a voluntary act of will on the part of the third party. Because the Medical Personnel Pool court articulated this rule and applied it to facts identical to those now before us, we conclude that we are bound to apply it in this case.

IV. SCOPE OF AGENCY

Any liability of the investors for the grain purchases from Parrish must arise from the agency relationship between Arizona National and the investors. The trial court found that the investors were undisclosed principals in the feed grain transactions between Parrish and Arizona National. Although Parrish asserts instead that the investors were partially disclosed

principals, the finding of the court below is not clearly erroneous.

[4] Under Texas law,[3] an undisclosed principal is liable for contracts made by his agent so long as the agent is acting within the scope of his authority. See, e.g., Medical Personnel Pool

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3 The parties and the trial court have interpreted the agency agreement under Texas law. The agreement itself, however, provides that "[t]his Agreement is to be deemed executed under and to be construed and governed by the laws of the State of Arizona." Texas choice of law doctrine, which we are bound to apply under Erie Railroad Co. v. Tompkins, supra, recognizes the right of parties to a contract to choose the law that will govern their contractual relationship, as long as the forum whose law is chosen has a reasonable relationship to the subject matter of the contract. See, e.g., Dowling v. NADW Marketing, Inc., 578 S.W.2d 475, 476 (Tex.Civ.App. 1979, writ ref'd n.r.e.); Securities Investment Co. v. Finance Acceptance Corp., 474 S.W.2d 261, 271 (Tex.Civ.App. 1971, writ ref'd n.r.e.). Thus, it might appear that Arizona law, not Texas law, should have determined the extent of Arizona National's agent authority. Because neither party raised or briefed this issue on appeal, we assume Texas law should apply.

of Dallas, Inc. v. Seale, 554 S.W.2d 211, 213 (Tex.Civ.App. 1977, writ ref'd n.r.e.). Moreover, the principal may be liable, even when the agent acts without authority, when the principal retains the benefits of the transaction. Owen v. King, 84 S.W.2d 743, 749-50 (Tex.Civ. App. 1935) rev'd on other grounds, 130 Tex. 614, 111 S.W.2d 695 (1938). Thus, if Arizona National had authority under the agency agreement to purchase grain from Parrish on the investors' behalf, or if the investors retained the benefits of the transaction, then the investors are liable to Parrish. We hold that the investors are liable under either theory.

[5] There can be little question that Arizona National had authority, at least for some period of time, to purchase cattle and feed grain for the investors. The entire purpose of the

cattle feeding program was for Arizona National to acquire, feed, and market the investors' cattle. The agency agreement signed by the investors, and the offering prospectus, make Arizona National's authority in this regard incontrovertibly clear.

The investors point out, however, that Arizona National initially purchased the feed grain from Parrish several weeks before the first investor signed an agency agreement. They argue that, whatever authority Arizona National enjoyed after the agency agreement was signed, it had no authority prior to that time. Moreover, the investors note that the renegotiated grain purchase contract was finalized on January 23, 1975. Because the purpose of the cattle feeding program was to provide the investors with tax deductions for 1974, the investors argue that

grain purchases after the end of the year also were beyond Arizona National's authority. Thus, although the investors must concede that the agency agreement authorized Arizona National to purchase grain for the investors, they argue that the grain purchased from Parrish was purchased too early and renegotiated too late to come within Arizona National's authority.

While the investors' argument is not unappealing, it proves, if anything, too much. The investors would have us believe that Arizona National could purchase no grain for them before they entered the cattle feeding program or after the end of the year. But it is apparent from a practical standpoint that the managed cattle feeding program depended on advance purchases of grain. The principal attraction of the program from the investors' standpoint was its

1974 tax advantages. Yet no investor entered the program until December 6, and at least two investors waited until December 31 to sign the agency agreement. In view of the logistical complexities of acquiring and feeding a large number of cattle, the investors could hardly have expected that all purchases would be made in the short period between the signing of the agency agreement and the end of the year. They must have known that some advance preparations would be made.

Moreover, as Parrish points out, the agency agreement explicitly recognized the possibility of advance purchases of grain. The prospectus provided that

> [t]he Company, as agent for the Owner, may engage in the advance purchases of feed and feed grains to be fed to cattle involved in

> each program.... It must be pointed out that, while such advance purchasing usually results in advantageous bulk prices, it may and has, in some instances, resulted in an Owner paying more for such feed than might be the case if purchases were not made until the feed was required by the Owner's cattle.

It is true that this extract from the prospectus may be intended to refer to "advance" purchases only in the sense that they are in advance of consumption by the cattle, and not in advance of the entry of the investors into the program. Nevertheless, the inherent ambiguity of the provision should have warned investors that there was a potential for loss occasioned by purchases of grain which had to be made in 1974 before they joined the program.

Equally important, the investors received and retained precisely what they sought from the managed cattle feeding program. The prospectus and agency agreement make clear that an eventual profit from marketing the cattle was far from assured. Indeed, charts included in the prospectus indicated that, in the previous year, only four out of thirteen investors sold their cattle for more than it cost to buy them, raise them, and bring them to market. Thus, the prime attraction of the program was its tax consequences. Under the program designed by Arizona National, each investor who paid the $6500 unit price was entitled to a deduction of between thirty and forty thousand dollars.[4] Each investor sued

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4 The $6500 unit price was used to purchase cattle and to pay Arizona National's fee. Feed grain expenses,

by Parrish in this case deducted the cost of the advance grain purchases from it on the investor's federal income tax for 1974. No investor renounced the tax advantages that accrued to him because of Arizona National's dealings with Parrish. Nevertheless, by contesting liability for Arizona National's contract with Parrish, they seek to disavow the economic realities that brought them those very tax advantages.

The investors argue that, whether or not Arizona National was authorized to purchase grain for them prior to their entry into the program, their agent should not be allowed to engage in

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totaling as much as $40,000, were met by funds borrowed against a security interest in the cattle. Under tax law existing at the time, a cattle owner who used the cash basis method of accounting could deduct the cost of feed grain purchased in the current year despite the fact that the grain would be delivered and consumed in a future year.

self-dealing. They contend that the assignment to them of grain purchase contracts in which Arizona National had a loss constituted such self-dealing. The loss-shifting effect of such an assignment might be controlling in an action between principals and a false agent, but it has no bearing on the issue of the investors' liability to Parrish. Self-dealing by the agent cannot relieve an undisclosed principal of his obligations to a third party. Both Parrish and the investors reposed confidence in Arizona National. Loss must befall one or the other. The investors cannot avoid contractual obligations to Parrish which were renegotiated and transferred for their benefit and from which they, in fact, derived the intended benefit. The fact that some other timing of feed grain purchases may have been more

advantageous does not affect their liability to Parrish.

We hold that the investors are liable to Parrish on the grain contracts because Arizona National had actual authority to purchase the grain for the investors, and because the investors received and retained the benefits of the transaction made in their behalf. Parrish has represented to this court that as between Arizona National and the investors, it elects to have judgment against the latter. Accordingly, the judgment against Arizona National is vacated and the judgment in favor of the investors is reversed. The case is remanded to the district court with instructions to enter judgment in favor of Arizona National as against Parrish and in favor of Parrish as against the

investors, the district court to determine, under applicable law, the amount of liability of each investor.

V. BANKERS AG

[6] Parrish asserts that Bankers Ag Credit Corporation also is liable for the grain contracts. Arizona National assigned the Parrish grain contracts to Bankers Ag as part of a financing arrangement designed to ensure that the debts corresponding to the grain purchases were dated in 1974 and that the investors, as a result, would be entitled to 1974 tax deductions. The assignments specifically provided, however, that Bankers Ag agreed to pay for the grain "as the commodity is consumed." Because no grain ever was consumed under the program and Bankers Ag had no agency relationship to Parrish, we affirm the trial court's ruling

that Bankers Ag bears no responsibility for payments on the grain contracts.

AFFIRMED IN PART and REVERSED IN PART.

HENDERSON, Circuit Judge, concurring in part and dissenting in part:

I concur and agree with that portion of the panel opinion holding that Parrish might have pursued the investors instead of Arizona National and, having done so, could have recovered from them.[1] Contrary to the view of the majority, however, I do not believe that Parrish had the right to make that election on appeal. Parrish's notice specifically limited its appeal to "that portion of the judgment... providing that plaintiff take nothing as against Bankers Ag [and the named investors]."

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1 I also adhere to the majority's conclusion that Bankers Ag was not liable on the grain contracts.

Parrish did not request leave to amend its notice of appeal, or offer to free Arizona National, until after oral argument, by which time the parameters of the investors' argument were well set. Parrish had its reasons for appealing only part of the judgment of the district court and it should be bound by its decision. F.R.A.P. 3(c) and 26(b).

The Texas decisions are inconsistent in their approach to the question of when a seller must decide whether to hold a principal or his agent. Yet, with the exception of Medical Personnel Pool of Dallas, Inc. v. Seale, 554 S.W. 2d 211 (Tex.Civ.App. 1977), they all say that the choice must be made before entry of judgment. Cf. Fort Terrett Ranch Co. v. Bell, 275 S.W. 81, 83 (Tex.Civ.App. 1925) (election permitted when both agent and principal appeal).

Some of the reported opinions conclude that a seller cannot name both principal and agent in a single action, but must elect which to sue. Heffron v. Pollard, 76 Tex. 96, 11 S.W. 165, 166 (1889) ("a plaintiff can not sue both; he must make his election"); Diacomis v. Wright, 20 S.W.2d 139, 140 (Tex.Civ. App. 1929), rev'd in part on other grounds, 34 S.W.2d 806 (Tex. 1931) ("either, but not both, may be sued for a breach"); Nail v. Boothe, 265 S.W. 1051 (Tex.Civ.App. 1924) ("the plaintiff cannot recover against both the agent and undisclosed principal, but must elect which he will sue"). Other cases recognize a single action againt both principal and agent, but enunciate "the rule that the seller may sue both the agent and the undisclosed principal, and at his option may, before judgment, elect to hold the undisclosed principal

liable by taking a nonsuit as against the agent." Owen v. King, 84 S.W.2d 743, 750 (Tex.Civ.App. 1935); accord, Veazie v. Beach Plumbing & Heating Co., 235 S.W. 695, 697-98 (Tex.Civ.App. 1921); Pittsburg Plate Glass Co. v. Roquemore, 88 S.W. 449, 450 (Tex.Civ. App. 1905).

The majority focuses on two recent Texas cases from intermediate appellate courts, Medical Personnel and Sherrill v. Bruce Advertising, Inc., 538 S.W.2d 865 (Tex.Civ.App. 1976), that "evince a subtle approach to the question of when the plaintiff must choose between agent and principal." Ante, at 1369. These cases cannot really be reconciled. None of the distinctions that might be drawn were significant to the reasoning of the courts, and I do not understand the majority to find one case more in point than the other. Rather, as the majority

candidly points out, our task is to choose which to follow. In my opinion, Sherrill conforms to the well-established Texas jurisprudence that a seller's decision to appeal only part of a judgment is a constructive election.

In Sherrill an advertising company sued a real estate developer for breach of contract. When the plaintiff learned the developer had been acting as agent for the trust that owned the real estate, the trustee was joined as a defendant. After the trial judgment was entered against both defendants on a joint venture theory, only the trustee appealed. The Court of Civil Appeals held that there had been no joint venture. The court went on to "imply" that the trustee was the undisclosed principal of the developer, but concluded that since the plaintiff had not appealed the judgment against the agent it could no

longer elect to look to the undisclosed principal for payment.

> An undisclosed principal is discharged from liability upon a contract if, with knowledge of the identity of the principal, the other party recovers judgment against the agent who made the contract for breach of the contract. Restatement (Second) of Agency §210(1) (1957). While this rule has received some discredit (See Merrill, Election Between Agent and Undisclosed Principal: Shall we follow the Restatement? 12 Neb.L.V. 1933)), the Texas courts have consistently followed it. 31 Tex.Dig. Principal & Agent §145(4) (1974). Here, the judgment against the agent Crane-Maier has become final. On the theory of principal and agent, the principal,

> Sherrill Trust, cannot now be held liable since there is a final judgment had against its agent for breach of the contract.

538 S.W.2d at 867 (emphasis supplied); see also Sherrill v. Ray, 538 S.W.2d 867 (Tex.Civ.App. 1976) (related case).

In Medical Personnel a woman (the agent) obtained nursing care from the plaintiff for her mother-in-law (the principal). After the bill became past due, the plaintiff sued both women. The jury, on special interrogatories, found that any agency between the women was undisclosed. The trial judge granted judgment in favor of the daughter-in-law. The Court of Civil Appeals held that it was error to grant the judgment n.o.v., and that, consequently, the nursing service had a right to elect on appeal which defendant to hold liable (citing Sherrill). 554 S.W.2d at 214.

On rehearing, the daughter-in-law maintained that the plaintiff made its election when it accepted judgment against her mother-in-law. 554 S.W.2d at 215. The court rejected this argument, saying that the trial judge, and not the plaintiff, made the election by granting the daughter-in-law a judgment after the jury found facts to support relief against her. The appeal was from that very decision of the trial judge, and from that decision only. In other words, the plaintiff never made an election, since an election "contemplates a freedom by that party to choose," which freedom the trial judge denied the plaintiff. Id.

The majority discounts Sherrill as giving "only cursory attention to the election issue," and says "the Sherrill court merely recited the rule prohibiting double recovery." Ante, at 1370.

If that be true, it is because it was written before Medical Personnel, when the Texas law was clear.[2] The court did not rely on the rule against double recovery, but rather the "consistently followed" Texas mandate that recovery of judgment against an agent discharges his principal. If either opinion is short of analysis, it is Medical Personnel, which ignores the previous Texas decisions and fails to cite any case permitting election on appeal.

When state law controls an issue in a diversity case, a federal court must look to the pronouncements of the state's highest court for guidance. Commissioner v. Estate of Bosch, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). The only relevant opinion of

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2 This conclusion is buttressed by the court's citation to the Texas Digest.

the Supreme Court of Texas is Heffron, which would prevent Parrish from even suing both Arizona National and the investors. Heffron is an old case, albeit one that is repeatedly cited by the lower courts, and were it clear that the Supreme Court of Texas would reach a different conclusion if faced with the question today, we might be free to ignore it. Bosch; Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 205-12, 76 S.Ct. 273, 278-280, 100 L.Ed. 199, 207-210 (1956) (J. Frankfurter, concurring). But the Supreme Court of Texas has not reversed Heffron even thought it has had numerous opportunities. With the exception of Medical Personnel, "there appears to be no confusion in the... cases, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions

of... judges on the question [and] no legislative development that promises to undermine the judicial rule." Bernhardt, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. at 206.

Sherrill is also consistent with the rationale behind the election rule. Although Medical Personnel holds that the essence of an election is free choice, the reason a plaintiff is put to an election at all must be found in the opinions that developed the rule. In making his contract the seller was looking to the credit of only one person--by definition the agent--and the cases reflect the view that if the seller switches his attention to the principal, of whose existence he was unaware when he entered the contract, he should then only be permitted to hold the principal responsible. See, e.g., Heffron.

The Restatement observes that there is no entirely satisfactory explanation for the rule, and that it is "inconsistent with the basic reason underlying the liabiity of the undisclosed principal," and perhaps even "unjust." Restatement, Second, Agency § 210, comment a. Cf. Williston on Contracts § 289 (3d ed. 1959). In fact, the election rule met with wide-spread approval in Texas partly because of dissatisfaction with the logic underlying the liability of an undisclosed principal, and, just or not, it is clear that Parrish had more time than the rule contemplates to make its choice.

The Restatement's treatment of judgments against partially disclosed principals provides a useful comparison which supports the approach of Sherrill and the older Texas cases. "Recovery of

judgment against the agent of a disclosed or partially disclosed principal... does not thereby discharge the principal..." Restatement, Second, Agency § 184(1). The comment on this subsection points out that a seller loses his rights against the principal when he "gets" a judgment against the agent after discovering the identity of an undisclosed principal, comment a, but only "satisfaction of the judgment against the agent terminates the liability of the [partially disclosed] principal," comment c (emphasis supplied).[3] Other jurisdictions have noted this distinction, and held that while only the satisfaction of a judgment against the agent of a partially disclosed principal will constitute an

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3 The comment observes that the election rules on disclosed and undisclosed principals are "not in accord."

election, in actions involving undisclosed principals such a constructive election occurs prior to satisfaction of the judgment. See the discussion in Clifton Cattle Co., Inc. v. Thompson, 43 Cal.App.3d 11, 117 Cal.Rptr. 500, 503-04 (1974).

For the foregoing reasons, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

N. K. PARRISH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO CA-5-75-28
SOUTHWEST BEEF INDUSTRIES CORPORATION, a Subsidiary of Arizona National Cattle Company; ARIZONA NATIONAL CATTLE COMPANY; BANKERS AG CREDIT CORPORATION; RUSSELL WINTER; R. E. HOGAN; LEE R. DELAY; BRIAN O. M. QUINN; JAMES DOUGHERTY; ROBERT BLUEMLE; E. W. McFARLAND; BILL LACY; B. G. CATTLE CO.; MICHAEL JARVIS; and BEN STEELE,	)	
	)	
Defendants.	)	

[Filed November 2, 1977]

The above-entitled and numbered cause was tried before the court, without a jury, on the 17th day of October,

1977, continuing through October 20, 1977. After hearing and considering the evidence, the pleadings, and briefs and argument of counsel, the court files herewith its findings of fact and conclusions of Law:

I

FINDINGS OF FACT

1. N. K. PARRISH, INC. (hereinafter referred to as "Parrish") is a corporation incorporated under the laws of the State of Texas. Its principal place of business is in Lubbock, Lubbock County, Texas.

2. Defendant, SOUTHWEST BEEF INDUSTRIES CORPORATION (hereinafter called "Southwest Beef") is a corporation incorporated under the laws of the State of Nevada. Its principal place of business is in Phoenix, Arizona. Southwest Beef is qualified to do business in the State of Texas, and has appointed

and maintained a designated agent in the State of Texas on whom service of process was obtained.

3. ARIZONA NATIONAL CATTLE COMPANY (hereinafter called "Arizona National") is a corporation incorporated under the laws of the State of Arizona. Its principal place of business at the time of the institution of this suit and at the time of trial of this case was and is in Phoenix, Arizona. Arizona National is not required by law to designate or maintain a resident agent in the State of Texas, at the time of institution of this suit had not appointed or maintained a designated agent in the State of Texas on whom service of process could be obtained, did not maintain a regular place of business in the State of Texas, and had no person in charge of any business in which it was engaged in the State of Texas. The

cause of action alleged by Parrish arose out of business done by Arizona National in the State of Texas, and Arizona National was and is subject to service of process pursuant to Article 2031b, Texas Revised Civil Statutes. Process was served on Arizona National pursuant to and in compliance with Article 2031b, Texas Revised Civil Statutes.

4. BANKERS AG CREDIT CORPORATION (hereinafter called "Bankers Ag Credit") is a corporation incorporated under the laws of the State of Kansas. Its principal place of business at the time of institution of this suit and at the time of the trial of this case was and is in Satanta, Kansas. Bankers Ag Credit is not required by law to designate or maintain a resident agent in the State of Texas, at the time of the institution of this suit had not appointed or maintained a designated agent in the State

of Texas, on whom service of process could be obtained, did not maintain a regular place of business in the State of Texas, and did not have a person in charge of any business in which it was engaged in the State of Texas. The cause of action alleged by Parrish against Bankers Ag Credit arose out of business done in the State of Texas by Bankers Ag Credit, and Bankers Ag Credit was and is subject to process pursuant to Article 2031b, Texas Revised Civil Statutes. Process was served on Bankers Ag Credit pursuant to and in compliance with Article 2031b, Texas Revised Civil Statutes.

5. BRIAN O. M. QUINN, M.D., was at the time this suit was instituted, and at the time this case was tried, a citizen and resident of the State of New York.

6. ROBERT BLUEMLE was at the time this suit was instituted, and at the time of trial of this case, a citizen and resident of the State of Arizona.

7. BILL LACY was at the time this suit was instituted, and at the time of trial of this case, a citizen and resident of the State of Kansas.

8. BEN STEELE was at the time this suit was instituted, and at the time of trial of this case, a citizen and resident of the State of Arizona.

9. JAMES DOUGHERTY, M.D., was at the time this suit was instituted, and at the time this suit was tried, a citizen and resident of the State of New York.

10. E. W. McFARLAND was, at the time this suit was instituted and at the time of trial of this case, a citizen and resident of the State of Arizona.

11. R. E. HOGAN was, at the time this suit was instituted, a citizen and resident of the State of Arizona. At the time this case was tried, he was a citizen and resident of the State of Colorado.

12. MICHAEL JARVIS was, at the time this suit was instituted and at the time of trial of this case, a citizen and resident of the State of Arizona.

13. LEE R. DELAY was, at the time this suit was instituted and at the time of trial of this case, a citizen and resident of the State of Arizona.

14. At the time of institution of this suit and at the time of trial of this case, BRIAN O. M. QUINN, ROBERT BLUEMLE, BILL LACY, BEN STEELE, JAMES DOUGHERTY, E. W. McFARLAND, R. E. HOGAN, MICHAEL JARVIS, and LEE R. DELAY are all natural persons and non-residents of the State of Texas, and are not required by

law to designate or maintain a resident agent in the State of Texas, have not appointed or maintained a designated agent in the State of Texas on whom service of process may be obtained, do not maintain a regular place of business in the State of Texas, and have no person in charge of any business in which they are engaged in the State of Texas. The cause of action alleged against any such person by Parrish arose out of business done by each such person in the State of Texas, and each such person is subject to such process pursuant to Texas Revised Civil Statutes, Article 2031b. Each of said persons was served with process pursuant to and in compliance with said Article 2031b, Texas Revised Civil Statutes.

15. B G CATTLE COMPANY is a business entity with its principal place of

business in Novato, Marin County, California. Its principals were at the institution of this suit and at the time of trial of this case all residents and citizens of the State of California. At the time of the institution of this suit and at the time of trial of this case, B G Cattle Company was not required by law to designate or maintain a resident agent in the State of Texas on whom service of process could be obtained, did not maintain a regular place of business in this State, and had no person in charge of any business in which it was engaged in this State. The cause of action alleged against B G Cattle Company by Parrish arose out of business done in the State of Texas by B G Cattle Company, and B G Cattle Company was subject to process pursuant to Texas Revised Civil Statutes, Article 2031b. Process was served on B G Cattle

Company pursuant to and in compliance with Article 2031b, Texas Revised Civil Statutes.

16. Each of the defendants herein has admitted and stipulated that he or it were citizens and residents of states other than the State of Texas at the time of the institution of this suit, and at the time of the trial of this case.

17. The matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of $10,000.00.

18. In addition to Southwest Beef Industries Corporation, Southwest Beef does business under the names of Arkansas Valley Feedyard Company, Arkansas Valley Feedyard, Arkansas Valley Feedyard, Inc., and Ark Valley Feedyard.

19. During the months of September through November, 1974, Southwest Beef entered into five separate sale and

purchase contracts with Parrish for the sale and purchase of approximately 11.7 million pounds of grain. (Pl. Exhibits Nos. 1, 10, 27, 35, and 46.) The contracts were numbered S-4336, S-4315, S-4311, S-4450, and S-4310. Each of the contracts was duly executed by Russell L. Ellsaesser, authorized agent and representative of Southwest Beef, and the court finds that they were executed on behalf of Arizona National Cattle Company. At the time of the execution of said contracts Arizona National was an undisclosed principal and Parrish was not aware of the agency relationship between Arizona and Southwest Beef. A quantity of the corn was delivered by Parrish pursuant to the contracts, and the corn was paid for. Southwest Beef and Arizona National were

unable to accept delivery of the remaining quantities specified in the contracts or to pay for the remaining quantity of corn according to the terms and conditions of the contracts.

20. During the months of November and December, 1974, Ellsaesser, as agent for and on behalf of Southwest Beef and Arizona National contacted personnel of Parrish and requested Parrish to extend the time for performance of the original contracts, and offered to enter into new contracts between the parties, extending the date of delivery and the place of delivery.

21. After a series of discussions between Ellsaesser, Hogan and Delay, and Johnny Cox and Larry Braden of Parrish, Parrish agreed to extend the original contracts (Pl. 1, 10, 27, 35, and 46) and renew them, conditioned upon the deposit of $25,000.00 margin, which deposit was made in January of 1975.

22. Ellsaesser, on behalf of Arizona National and Southwest Beef also agreed to pay storage on the grain commencing January 1, 1975, at the rate of one cent per hundred pounds per four days.

23. The new terms agreed upon by Ellsaesser on behalf of Arizona National and Southwest Beef are as reflected in Parrish contracts S-4600, S-4602, S-4601, S-4603, and S-4599 (Pl. Ex. 2, 12, 30, 37, and 48). The terms and conditions contained in plaintiff's exhibits were accepted and agreed upon by Ellsaesser, Southwest Beef for itself and as agent for Arizona National Cattle. Lee R. Delay, as President of Arizona National, agreed to accept and arranged to accept the contracts on the terms and conditions made prior to December 31, 1974.

24. During the month of January, 1975, the renewal contracts were prepared by personnel of Parrish and were dated January 23, 1975. The renewal contracts were then forwarded to Arizona National, Phoenix, Arizona.

25. The original contracts and the renewal contracts were performable in part in the State of Texas by all parties to this lawsuit.

26. After the renewal contracts, dated January 23, 1975, were received by Arizona National at its office in Phoenix, Arizona, Nancy Shermerhorn, an officer and employee of Arizona National, contacted Larry Braden, an employee of Parrish, and requested permission of Parrish to change the dates on the contracts from January 23, 1975, to December 31, 1974. Parrish voiced no objection to the change, and the dates on the renewal contracts were

changed to reflect the date of December 31, 1974, and the contracts were accepted by Arizona National Cattle Company and Southwest Beef.

27. At the time of the negotiations concerning, and entry into, the renewal contracts, Arizona National had entered into a managed cattle feeding program agency agreement with the following individual investors on the following dates:

(a) Brian O. M. Quinn, December 6, 1974;

(b) James Dougherty, December 16, 1974;

(c) Robert Bluemle, December 20, 1974;

(d) E. W. McFarland, December 24, 1974;

(e) Bill Lacy, December 24, 1974;

(f) B G Cattle Company, December 30, 1974;

(g) Michael Jarvis, December 30, 1974; (as noted below Jarvis did not sign his contract and his agreement was entirely oral)

(h) Ben Steele, December 31, 1974;

(i) R. E. Hogan, on or prior to December 31, 1974.

The above persons are referred to herein as individual investors.

28. Prior to each individual investor's entering into the managed cattle feeding program, in the year 1975, he was furnished with a prospectus. With regard to the prospectus, Arizona National filed with the Securities and Exchange Commission, Washington, D.C., a registration statement. In

addition to the prospectus, the individual investors were furnished with other instruments. (Pl. Ex. 90, 90a, 90b).

29. All but one of the individual investors (Jarvis) executed an agency agreement in the exact form and content of Plaintiff's Exhibit 94a, and by virtue of such instrument and the other documents furnished to the individual investors, including the prospectus, Arizona National became the designated agent for each of the individual investors in all matters incident to the purchase and feeding of cattle. Mr. Jarvis never executed or authorized the execution of an agency agreement on his behalf.

30. At the time of the execution of the agency agreement each individual investor (except Jarvis) specifically in writing rejected the formal instruction letter attached to the agency agreement,

which instruction letter requires Arizona National to obtain an indemnification arrangement with feedlots or financing entities to limit the extent of the individual investors' potential loss.

31. Southwest Beef Industries Corporation, d/b/a Arkansas Valley Feedyard Company, Arkansas Valley Feedyard, Inc., Ark Valley Feedyard, and Arkansas Valley Feedyard, and Russell Ellsaesser were agents at all times material to this suit for Arizona National. Arizona National was the agent of the individual investors but as will be hereinafter found, such agents exceeded the authority possessed by them. The individual investors were undisclosed principals and the agency relationship was unknown to Parrish.

32. Southwest Beef has stipulated and admitted liability as to all of the Parrish contracts.

33. On December 31, 1974, Arizona National, purporting to act as agent for each of the individual investors (whose names were not disclosed but were identified by number only), executed and delivered to the State Bank of Satanta, Kansas, various notes (Pl. Ex. 22 through 26). At the same time, Arizona National also executed security agreements (Pl. Ex. 61, 62, 64, 65, 68, 70, 72, 74, and 76) and financing statements (Pl. Ex. 60, 63, 65, 67, 69, 71, 73, and 75) as agent for each of the individual investors. Each security agreement, note and financing statement contained an account number which was assigned to each individual investor in order that the identity of the investors could remain undisclosed. These notes and

security agreements are now owned and held by Bankers Ag, but Bankers Ag is not seeking any recovery on these notes in this case.

34. That all of the parties, individual investors and Arizona National, agreed that the cattle and grain purchases would be made on non-recourse notes.

35. That it was the understanding of all the parties in the cattle feeding program that the individual investors would have no liability in excess of the $6,500.00 per unit.

36. That each investor paid $6,500.00 per unit in cash.

37. That the cattle were purchased on non-recourse notes and Arizona National did not purport to bind the credit of the individual investors.

38. That the grain purportedly purchased on non-recourse notes by

Arizona National from Bankers Ag were not actual transactions of sales and purchases but were merely sham or paper transactions and the actual purchases of the grain were by the contracts between Southwest Beef and N. K. Parrish.

39. That Arizona National Cattle Company had never purchased cattle or grain for a customer except on non-recourse notes insofar as these transactions are concerned.

40. That the parties, the individual investors and Arizona National Cattle Company, agreed that any grain to be purchased would be bought for each investor on or prior to December 31, 1974; the purpose of this understanding was to secure a possible tax deferral benefit for the individual investors.

41. That no one of the individual investors would have entered into the contracts except on the representations

that the grain would be purchased for them on or before December 31, 1974.

42. That no grain was purchased for any individual investor until on or after January 23, 1975, and

43. That each investor was furnished "back-dated" documents indicating a purchase of grain for his account on December 31, 1974.

44. That no obligation was incurred on behalf of any investor, except on non-recourse or non-liability notes.

45. As between the parties, individual investors and Southwest Beef Industries Corporation, Southwest Beef had no authority to bind the individual investors.

46. That Southwest Beef Industries had no authority to purchase grain for the individual investors after December 31, 1974.

47. Neither Arizona National nor Southwest Beef had any authority to purchase grain for their investors substantially in excess of the market price.

48. That on and after December 31, 1974, the Grain Contracts in question called for prices substantially in excess of the market at the time.

49. In entering into Contracts with Ellsaesser, and/or Southwest Beef Industries, and/or Arizona National Cattle Company, Parrish Grain Company did not deal with them as agents of the individual investors and was not aware of them as agents for the investors.

50. Plaintiff Parrish did not know the names of the individual investors until after the instigation of this litigation.

51. Plaintiff Parrish, in entering the Contracts, did not rely on the credit of the individual investors.

52. In December 1974, Southwest Beef and Arizona National each knew that the grain market was substantially lower than the contract price of the grain.

53. No investor entered the cattle feeding program prior to December 1, 1974.

54. Arizona National Cattle Company had no authority to purchase grain prior to such time as an individual investor entered the cattle feeding program.

55. In any event, the individual investor's liability is limited to the net loss incurred by the investor upon the sale of the cattle and no authority was given by the individual investors to any person or firm to incur any other liability.

56. That Russell Ellsaesser, at all pertinent times, was president and a principal stockholder of Arkansas Valley Feed Yards, Inc.

57. That Arkansas Valley Feed Yards, Inc. owned forty percent of the stock of Southwest Beef Industries Corporation and that Arizona National Cattle Company owned sixty per cent of the stock of Southwest Beef.

58. That no disclosure was made to the individual investors of the ownership interest of Ellsaesser in the Arkansas Feed Yards, Inc.

59. That no disclosure was made to the individual investors of the ownership of Arkansas Valley Feed Yards, Inc. in Southwest Beef Industries Corporation; and that no disclosure was made to the individual investors that Southwest Beef Industries took over contracts of Russell Ellsaesser and/or Arkansas

Valley Feed Yards, Inc.; and that no disclosure was made to the individual investors that Arizona National Cattle in late January or early February 1975 was attempting to assign them grain previously owned by Russell Ellsaesser and/or Arkansas Valley Feed Yards, Inc.

60. By the assignments executed by Arkansas Valley Feed Yard Company dated December 31, 1974, of the December 31, 1974, Parrish grain contracts, Bankers Ag Credit Corporation agreed to pay for the Parrish grain only when the grain was consumed by cattle placed in the Arkansas Valley Feedyard, at Lamar, Colorado, pursuant to the cattle-feeding program set up at such yard by Arizona National Cattle Company, and the grain has never been delivered nor fed to the cattle under these programs.

61. The parties, Arizona National, Southwest Beef Industries dba Arkansas

Valley Feedyard and Bankers Ag Credit Corporation agreed that the duty of Bankers Ag Credit Corporation as regards payment for the Parrish grain was as set out in Finding of Fact No. 60 above.

62. The sale by Bankers Ag Credit Corporation of the quantity of grain set out in the "Commodity Sales Contracts" to Arizona National Cattle Company, as agent for its undisclosed principals designated therein by numbers, to be delivered at Arkansas Valley Feedyard, was intended by the parties to be an assignment of the Parrish grain contracts to Arizona National Cattle Company.

63. Bankers Ag Credit Corporation was not an agent for the individual investors or of Arizona National Cattle Company and never purported to act for them or any of them, and never became a

principal or agent of Arizona National Cattle Company.

64. Bankers Ag never possessed any actual or real authority to act for or on behalf of the individual investors.

65. The assignments of the Parrish contracts from Bankers Ag to Arizona National were accepted by Arizona National, but any acceptance by Arizona National as an agent for the individual investors was outside the authority possessed by Arizona National as such agent. Therefore the acceptance was on individual investors. By such acceptance Arizona National agreed to be bound by the terms of the contracts and to pay for the grain as contracted for.

66. During the course of the trial plaintiff stipulated that its cause of action against Russell Winter should be dismissed with prejudice.

67. At all times Lee R. Delay was acting solely as an officer of Arizona National and none of his actions were taken in his individual capacity and he never represented to anyone that he was acting individually. None of the other parties to the transaction ever dealt with or purported to act with Mr. Delay as a principal in the transactions or in his individual capacity.

68. Arizona National and Southwest Beef have breached all of the contracts with Parrish as of April 1, 1975.

69. Parrish owned all grain called for in the original and renewal contracts in question, and at all times was able and willing to perform, and demands for acceptance of the grain were rejected by Arizona National.

70. The arrangements for the purchase of the grain in question by Ellsaesser were done with full knowledge

of and under the authority given by Lee R. Delay who was an officer of and fully authorized to act on behalf of Arizona National.

71. As a result of the breach of the contracts by the individual investors, Arizona National and Southwest Beef, Parrish sustained the following damages:

(a) $174,196.82, representing the difference between the total contract price called for in the Parrish grain contracts and the market price on April 1, 1975. Such amount is stipulated by the parties in the pre-trial order on file herein. See stipulation E in the pre-trial order.

(b) Storage on the grain to April 1, 1975, in the amount of

$32,103.91. Such amount is stipulated by the parties in the pre-trial order on file herein.

(c) Attorney's fees in the amount of $16,015.49 per the stipulation of the parties contained in the pre-trial order and the testimony of Robert E. Garner, which amount the court finds to be a reasonable fee.

(d) The total amount of damages sustained by Parrish is the sum of $222,316.22.

72. Arizona National and Southwest Beef are liable, jointly and severally, and Parrish is entitled to recover of and from Arizona National and Southwest Beef the sum of $222,316.22.

73. On February 20, 1975, John E. Vickers of the firm of Garner, Vickers, Purdom & Nelson, sent a letter to Mr. Lee R. Delay of Arizona National, by

certified mail, return receipt requested, requesting Mr. Delay, on behalf of Arizona National, to furnish assurances as required under § 2.609 of the Uniform Commercial Code of the State of Texas, and to furnish shipping instructions for the Parrish grain. Additionally, the letter made demand on behalf of Parrish for sums of money which were due at that time under the terms of the renewal contracts. Thereafter, on or about March 3, 1975, Douglas I. Dunipace, attorney who was employed by Southwest Beef and Arizona National Cattle, contacted John E. Vickers and represented to Mr. Vickers that Arizona National did not want to close the contracts out at that time, and ratified all activities occurring in the past through Delay, Ellsaesser, Southwest Beef, Winter, Bankers Ag Credit, and State Bank of Satanta, and Parrish relied on such

representations. Dunipace requested that the demand of Parrish for assurance be temporarily postponed by mutual agreemen while Arizona National, who was in the process of purchasing cattle on behalf of the individual investors, was able to buy cattle in sufficient quantities to enable Arizona National to secure necessary financing to feed the cattle being bought or placed in feedlots on a contract basis. In addition to his assurances that Arizona National and Southwest Beef wished to perform their contracts with Parrish and to purchase and pay for te quantities of grain at the prices and terms provided in the renewal contracts, Dunipace asked for a delay or postponement until the week of March 10, 1975, in which to furnish assurances. Vickers, on behalf of Parrish, thereupon agreed to postpone

further action on the demand for assurances until the week of March 10, 1975, but advised Dunipace that the market price of the corn had declined substantially so that there was a differential of almost $200,000.00 between the contract price of the corn and the market price at that time, plus accrued storage. Neither Dunipace nor any of the employees of Arizona National, nor Southwest Beef, produced any assurances by March 10, 1975, as demanded by Parrish in its letter of February 20, 1975, from Vickers to Delay.

74. On March 17, 1975, Vickers, on behalf of Parrish, sent to Dunipace a Mailgram, formally demanding assurances. Neither Dunipace nor anyone on behalf of Arizona National or Southwest Beef responded to the Mailgram which had been received by Dunipace. The assurances were not received by 4:00 P.M. on

March 19, 1975 as demanded in the Mailgram.

75. All stipulations of the parties as shown by the pre-trial order and the record in this case will be deemed to be a finding of fact by this court.

II

CONCLUSIONS OF LAW

1. This court has jurisdiction over the persons of each of the defendants in this suit. 28 U.S.C. § 1332.

2. This court has jurisdiction over the subject matter of this lawsuit.

3. Under the facts shown by the evidence in this case, Bankers Ag Credit Corporation had no duty to pay for the Parrish grain and no such duty ever arose, because the grain was never fed to nor consumed by cattle placed in a cattle feeding program at Arkansas Valley Feedyard Company.

4. Under these facts Parrish cannot recover against Lee R. Delay as an individual and all relief against Lee R. Delay will be denied.

5. Russell Winter, a defendant, is to be dismissed and plaintiff's cause of action against him will be dismissed with prejudice in accordance with the announcement in open court.

6. No authority existed in anyone to purchase for an investor prior to the dates on which they entered the managed cattle feeding program and in no event did any investor enter the program prior to December 1, 1974.

7. No authority existed in anyone to bind the individual investors to pay for the purchase of any grain after December 31, 1974.

8. No authority existed in anyone to purchase grain or cattle on behalf of

any individual investor except on non-recourse notes.

9. All parties to the Notes construed such notes to be notes without personal liability on the part of the investors.

10. No authority existed in anyone to purchase grain for the individual investors substantially in excess of the market price at the time of the purchase.

11. No authority existed on the part of Southwest Beef Industries to purchase grain for the individual investors.

12. No authority existed on the part of Arizona National Cattle Company to take over Contracts of Russell Ellsaesser and/or Arkansas Valley Feed Yards, Inc. on behalf of their individual investors without full disclosure.

13. Arizona National Cattle Company did not bind the credit of the individual investors except to the extent of non-liability notes.

14. Since Parrish was not aware of the existence of the undisclosed principals at the time of his contracts with Ellsaesser and/or Arkansas Valley Feed Yards, or at the time of his contract with Southwest Beef Industries, the investors are bound only to the extent of the exercise of actual authority possessed by Arizona National Cattle Company from the individual investors.

15. N. K. Parrish, Inc. is not entitled to recover against the following named defendants: Brian O. M. Quinn, James Dougherty, Robert Bluemle, E. W. McFarland, Bill Lacy, B G Cattle Co., Michael Jarvis, Ben Steele, and R. E. Hogan.

16. No other party is entitled to relief against Brian O. M. Quinn, James Dougherty, Robert Bluemle, E. W. McFarland, Bill Lacy, B G Cattle Co., Michael Jarvis, Ben Steele, R. E. Hogan, Lee R. Delay, and Russell Winter; and such persons are entitled to judgment in their behalf.

17. No pre-judgment interest may be recovered in this case.

18. Parrish is entitled to judgment against Arizona National and Southwest Beef, jointly and severally, in the sum of $222,316.22.

19. None of the parties have ratified or adopted the actions of Southwest Beef or Arizona National Cattle in their dealings with Parrish.

20. A judgment will be entered accordingly.

21. If any of the conclusions of law herein be findings of fact, it will

be deemed that they are found as facts and if any of the findings of fact are found to be conclusions of law, they will be deemed as part of the conclusions of law above.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 2nd day of November A.D. 1977.

/s/ HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

N. K. PARRISH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. CA-5-75-28
SOUTHWEST BEEF INDUSTRIES CORPORATION, a Subsidiary of Arizona National Cattle Company; ARIZONA NATIONAL CATTLE COMPANY; BANKERS AG CREDIT CORPORATION; RUSSELL WINTER; R. E. HOGAN; LEE R. DELAY; BRIAN O. M. QUINN; JAMES DOUGHERTY; ROBERT BLUEMLE; E. W. McFARLAND; BILL LACY; B. G. CATTLE CO.; MICHAEL JARVIS; and BEN STEELE,	)	
	)	
Defendants.	)	

J U D G M E N T

[Filed November 2, 1977]

This action came on for trial before the court, with the undersigned judge presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED

That the plaintiff, N. K. Parrish, Inc., recover of the defendants, Southwest Beef Industries Corporation and Arizona National Cattle Company, jointly and severally, the sum of $222,316.22 together with interest thereon at the rate of 9% per annum from this date until paid.

The defendants, Southwest Beef Industries Corporation and Arizona National Cattle Company, shall pay all costs.

It is further ORDERED, ADJUDGED and DECREED that the plaintiff take nothing against the defendants Bankers Ag Credit Corporation, Russell Winter, R. E. Hogan, Lee R. Delay, Brian O. M. Quinn, James Dougherty, Robert Bluemle, E. W. McFarland, Bill Lacy, B G Cattle Co., Michael Jarvis, and Ben Steele. All

relief not herein granted is hereby DENIED.

DATED at Lubbock, Texas this 2nd day of November A.D. 1977.

/s/ HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITS A & B

NO. 78-1041

N. K. PARRISH, INC.,

Plaintiff-Appellant,

versus

SOUTHWEST BEEF INDUSTRIES CORPORATION, Etc., Et Al.,

Defendants-Appellees.

[Filed June 22, 1981]

- - - - -

Appeal from the United States District Court for the Northern District of Texas

- - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 13, 1981, 5 Cir. 198_, ___ F.2d ___)

(June 22, 1981)

Before CHARLES CLARK, RONEY and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

Opposition

81-559

Office - Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

NO. ~~81-599~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT L. BLUEMLE,

Petitioner,

vs.

N. K. PARRISH, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Trustee for N. K. Parrish, Inc.,
a Bankrupt

QUESTION PRESENTED

The real question presented in this appeal is whether or not a party may elect to take judgment against a principal on appea'

LISTING OF PARTIES

Parties i the United States Court of Appeals were plaintiff N. K. Parrish, Inc., and defendants Southwest Beef Industries Corporation, Arizona National Cattle Company, Bankers Ag Credit Corporation, Russell Winter, R. E. Hogan, Lee R. Delay, Brian O. M. Quinn, James Dougherty, Robert Bluemle, E. W. McFarland, Bill Lacy, B.G. Cattle Co., Michael Jarvis and Ben Steele.

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BRIEF OF N. K. PARRISH, INC. IN OPPOSITION TO PETITION OF ROBERT L. BLUEMLE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent N. K. Parrish, Inc. prays that the writ of certiorari sought out be denied.

STATEMENT OF THE CASE

The Fifth Circuit has correctly stated the facts of the case in its published opinion. Liability is not questioned. The only complaint presented is the allowance of Plaintiff to elect on appeal to have judgment against the principal Bluemle. The trial court awarded judgment against the insolvent agent. On appeal, judgment as to the agent was reversed so that the Petitioner recovered judgment against the principal only, and not the agent.

REASONING AND AUTHORITY FOR DENYING THE WRIT

The Fifth Circuit, in the majority and dissenting opinion, analyzes carefully two Texas cases which superficially appear to conflict. They do not. The cases are *Sherrill* v. *Bruce Advertising, Inc.*, 538 S.W. 2d 865 (Tex. Civ. App. — 1976, no writ) cited by Bluemle; and *Medical Personnel Pool of Dallas, Inc.* v. *Seale*, 554 S.W.

2d 211 (Tex. Civ. App. — 1977, writ ref'd n.r.e.) cited by Parrish.

The most recent treatise on the question, which is a basic codification of the applicable Texas law, is found in 3 Tex. Jur. 3d, Agency §215:

> §215. *Election between principal and agent as defendant*
>
> Where the agent enters into a contract with a third party without disclosing the existence of the agency relation, the general rule is that either the agent or the principal may be held liable on the agreement. However, the third party in such a case is not permitted to recover against both the principal and the agent and he must make an election as to the one he wishes to hold liable. Thus, where an action is brought against the agent and the agent discloses the identity of his principal, who is then brought in as a party, and where the plaintiff establishes a cause of action against both the agent and the principal, the plaintiff will be required to elect whether he will proceed to judgment against the agent or the principal. No question as to an election of defendants is presented, however, where the third party substitutes, as the basis of the action, a contract made directly between himself and the principal for that made between himself and the agent.
>
> Although some of the earlier cases on the subject use language indicating that the third

> party may not sue both the principal and the agent, and must make his election as to which to sue, later cases have relied on these cases in stating the rule which now seems to prevail to be that where an action is brought against an agent, and the identity of an undisclosed principal is then disclosed and the principal is made a party, the third party may proceed with his action against both parties. In such circumstances, the third party may proceed to establish liability of both the agent and the principal, but must then, prior to judgment, elect to take judgment against one or the other and should obtain a dismissal as to the other party. It has also been held that where the trial court erroneously enters judgment against both the principal and agent, an appellate court is authorized to permit the third party to elect which he will hold liable, on appeal, and then modify the judgment accordingly.

The Court, to apply the law in this case, must answer five basic questions. Those questions are: WHY? WHEN? WHERE? HOW? WHO?

WHY

Election of remedies has been called a harsh doctrine. Consequently, it is not a favorite of equity and its scope should not be extended. *American Savings and Loan Association of Houston* v. *Musick*, 531 S.W. 2d 581, at page 588 (Tex. 1976). It is used to prevent rather than permit double redress for a single wrong. *Slay* v. *Burnett*

Trust, 143 Tex. 621, 187 S.W. 2d 377, at page 393 (1945). Thus, where one receives anything of value under the claim thus asserted or if the other party has been affected adversely, such election constitutes an estoppel thereafter to pursue another and inconsistent remedy. *Seamans Oil Co.* v. *Guy*, 115 Tex. 93, 276 S.W. 424, at page 426 (1925); *Lomas and Nettleton Co.* v. *Huckabee*, 558 S.W. 2d 863, at page 864 (Tex. 1977).

WHEN

Under Texas' liberal system of pleading, a party may state his claim or defenses alternatively or hypothetically, and as many as he has, regardless of inconsistency. *McKenzie* v. *Carte*, 385 S.W. 2d 520, at page 526 (Tex. Civ. App. — Corpus Christi 1965, writ ref'd n.r.e.). If a party pleads more than one theory of recovery or defense, normally, he need not elect between them until after the verdict. *Commercial Music Co.* v. *Klag*, 288 S.W. 2d 168, 170 (Tex. Civ. App. — San Antonio 1956, no writ). He is entitled to the greatest relief under either theory that the verdict will support. *Hargrove* v. *Trinity Universal Ins. Co.*, 152 Tex. 243, 256 S.W. 2d 73, 75 (1953); *Mowery* v. *Fantastic Homes, Inc.*, 568 S.W. 2d 171 (Tex. Civ. App. — Dallas 1978, writ pending).

Regardless of when the defendant is required to elect, and without considering any adverse effect on another

party, the doctrine may not be invoked by the trial judge without any pleadings or motion raising it in violation of the well-established rules that estoppel must be specifically raised. Indeed, estoppel is required to be plead under Texas Rules of Civil Procedure. *W. C. Bowman Lumber Co.* v. *Pierson*, 110 Tex. 543, 221 S.W. 930, 931 (1920); *Manning* v. *Sammons*, 418 S.W. 2d 362, 365 (Tex. Civ. App. — Fort Worth, 1967, writ ref'd n.r.e.). Election is a particular application of the doctrine of estoppel and must likewise be specially pleaded. *Redding* v. *Ferguson*, 501 S.W. 2d 717, 720 (Tex. Civ. App. — Fort Worth 1973, writ ref'd n.r.e.); *Bradley* v. *Straus-Frank Company*, 414 S.W. 2d 504, 509-510 (Tex. Civ. App. — Dallas 1967, no writ); *McKenzie* v. *Carte*, 385 S.W. 2d 520, 526 (Tex. Civ. App. — Corpus Christi 1965, writ ref'd n.r.e.); *Betty* v. *Tuer*, 292 S.W. 271, 272 (Tex. Civ. App. — Beaumont 1927, no writ).

WHERE

In the case of *Sherrill* v. *Bruce Advertising, Inc.*, 538 S.W. 2d 865 (Tex. Civ. App. — 1976, no writ), election was not made on appeal. In the case of *Medical Personnel Pool of Dallas, Inc.* v. *Seale*, 554 S.W. 2d 211 (Tex. Civ. App. — 1977, writ ref'd n.r.e.), the election was made on appeal, and the court stated that it was timely made. In *Fort Terrett Ranch Co.* v. *Bell*, 275 S.W. 81

(Tex. Civ. App. — Austin, 1925), election was permitted on appeal, as well. The *Seale* case was expressly approved by the Supreme Court of Texas by its refusal to grant a writ of error, which could have been granted based on conflict, if any existed. The *Sherrill* case which preceded it, was never presented to the Supreme Court of Texas. Therefore, it can correctly be stated that the only two cases in Texas which actually speak to the question of where election may be made have been approved by the Supreme Court of Texas, and in both of such cases, election was made on appeal as the necessity for such required it.

HOW

The election is made by a statement in a brief or motion to any court before which the case is pending which expresses the desire of the plaintiff. *Medical Personnel Pool of Dallas, Inc.* v. *Seale*, 554 S.W. 2d 211 (Tex. Civ. App. — 1977, writ ref'd n.r.e.); *Fort Terrett Ranch Co.* v. *Bell*, 275 S.W. 81 (Tex. Civ. App. — Austin, 1925).

WHO

Under the cases of *Sherrill* v. *Bruce Advertising, Inc.*, 538 S.W. 2d 865 (Tex. Civ. App. — 1976, no writ), and *Fort Terrett Ranch Co.* v. *Bell*, 275 S.W. 81 (Tex. Civ. App. — Austin, 1925), it is clearly the settled law that

the plaintiff is the party who is entitled to make the election, and not the trial judge or the appellate court.

CONCLUSION

Both the judgment of the trial court and the judgment of the Fifth Circuit awarded judgment against one party, and did not permit plaintiff to double recovery, which is prohibited.

It is a settled law of Texas that the plaintiff has the right to elect who he chooses to have judgment against, and that this election need not occur until the choices are evident, that the election may be made in the appellate system and so long as only one recovery is permitted.

Respectfully submitted,

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